

CITY OF MIAMI BEACH
Office of the City Manager
Letter to Commission No. 195-2004



To: Mayor David Dermer and
Members of the City Commission

Date: July 27, 2004

From: Jorge M. Gonzalez
City Manager

Subject: **LOEWS HOTEL BUYOUT OF CITY/RDA INTEREST IN PREMISES**

Article 36 of the Agreement of Lease between the Miami Beach Redevelopment Agency ("RDA"), City of Miami Beach ("City"), and Miami Beach Redevelopment Inc. ("Loews"), dated September 20, 1996, provides the Loews' an Option to Purchase the City/RDA's interest in the land and improvements, including the public areas and the hotel (the "Premises").

As reported in November 2003, the Loews had been evaluating, and expressed their preliminary intent, to exercise their Option to Purchase, prior to the December 1, 2004 date provided for in the Lease. Pursuant to Section 36.2 of the existing Lease, the Loews has the right and option to buy the City/RDA interest in the Premises while the Redevelopment Agency's Series 1993 Tax Increment Bonds (the "Bonds") are outstanding, at a price that is equal to the greater of (a) the appraised fair market value of our interest in the Premises (according to an appraisal procedure specified in the Lease; Article 31) or (b) the amount determined by a formula that returns an 8% return on the Land with a fixed value of \$24,000,000 to the Redevelopment Agency. After December 1, 2004, the purchase price is calculated only on (b) above without consideration of an appraisal. The outstanding amount of these bonds as of December 1, 2003, was \$20,075,000. In the end, the Loews did not exercise its Option to Purchase at that time.

However, on June 24, 2004, the Loews provided the City with confirmation of its intent to proceed with "a Notice of Intent to Exercise on Approximately July 30, 2004," with an exercise/closing date of December 2, 2004 (see attached correspondence). The relevant sections of the Agreement of Lease are attached as well as the option purchase price, as calculated by Loews as set forth in Section 36.2(b)(i)(y)(1) of the Ground Lease, based on this calculation, the purchase price would amount to \$28,009,178.

On Monday, July 26, 2004, the Loews verbally advised it was proceeding with the notice and payment on July 30th.

The Administration, City Attorney, and Bond Counsel are reviewing the tax implications and permitted uses of the proceeds the City will receive from the Loews purchase option. In connection therewith, the City/RDA has engaged Integra Realty Resources (Michael Cannon) to conduct a Fair Market Value Appraisal which will be utilized to address bond counsel requirements for tax analysis purposes, to determine eligible proceed uses and is not relevant or related in any way to the Option to Purchase clause in the Agreement of Lease.

July 27, 2004
Loews Hotel Buyout - LTC
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If you have any questions, please contact me.

JMG\CMC\rar

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c: Patricia Walker, Chief Financial Officer
Christina M. Cuervo, Assistant City Manager

RECEIVED
04 JUL 27 PM 2:28
CITY CLERK'S OFFICE



Vincent F. Dunleavy
EXECUTIVE VICE PRESIDENT - FINANCE
CHIEF FINANCIAL OFFICER

June 24, 2004

CITY ATTORNEY'S OFFICE
04 JUN 23 PM 12:29

Ms. Trish Walker
Director of Finance
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Dear Trish:

As you and I have discussed, Loews Hotels is planning to exercise its option to acquire the land underlying the Loews Miami Beach hotel. In order to accomplish that objective, we would need to do a variety of things prior to the exercise/closing date. To allow both of us to plan accordingly, I thought it would be useful to outline the requisite steps to be taken and to provide you with our calculation of the option purchase price. Bill Weber, our counsel, and Luis Reiter with Squire Sanders, the City's bond counsel, both of whom worked on the Ground Lease provisions, have already spoken about this, and I am sending a copy of this letter to them and to Murray Dubbin, City Attorney, as well.

Assuming we proceed with the option exercise:

1. MB Redevelopment Corp. (MB) would give the Miami Beach Redevelopment Agency (the Agency) a Notice of Intent to Exercise on approximately July 30th, which is more than 122 days prior to the date of exercise/closing (December 2nd) as provided in Section 36.2(b)(ii) of the Ground Lease.
2. At that time, MB would prepay Base Rent and Percentage Rent under the Ground Lease sufficient to redeem the Agency's \$25 million of 1993 Bonds. This amount, including the income generated on these funds from the prepayment date through closing, would be applied to the option purchase price paid at the closing. Based on information available to us, the prepayment amount would be \$19,852,303. Our calculation of this amount is provided on the spreadsheet attached to this letter.
3. MB would give the Agency an Exercise Notice on or around October 1st establishing December 2nd as the exercise/closing date.

Ms. Trish Walker
June 24, 2004
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4. The purchase would be closed and funded, and title passed to MB, on December 2, 2004.

By following this procedure, the option purchase price would be calculated under Section 36.2(b)(i)(y)(1) of the Ground Lease. Based on this calculation the purchase price would amount to \$28,009,178. Our calculation of the purchase price is also set out in the attached spreadsheet.

I will plan to give you a call after the July 4th holiday to go over any questions you may have so that we can be in a position to move forward with the notice and payment on July 30th. Of course, if you have any questions, please do not hesitate to call me.

Very truly yours,



Vincent F. Dunleavy

cc: Mr. Jack Adler
Gary W. Garson, Esq.
Kenneth J. Zinghini, Esq.
Murray H. Dubbin, Esq. ✓
Luis Reiter, Esq.
William J. Weber, Esq.

Miami Land Lease Buyout - Schedule I Exercise and Closing Date of 12/2/2004 Summary

Amount due 12/2/2004 to return 8% IRR - see attached Schedule II

Paid as follows:

- 1) Prepayment of rent due in an amount sufficient to redeem Bonds Outstanding on 12/2/2004 (after principal payment and interest due 12/1/2004), discounted from 7/30/04 at 1%, simple *
- 2) Interest earned on Prepayment of rent from 7/30 - 12/2/2004 at 1% *
- 3) Balance paid at closing on 12/2/2004

* 1% simple interest is used only for this preliminary calculation, actual rate would be determined prior to Notice of Intent to Exercise.

\$28,009,178.00
\$19,783,614.00
\$19,852,303.00
8,156,875.00
\$28,009,178.00

	Orig Prin	Prin Paid to 12/1/04	Prin Balance @ 12/1/04	Interest Rate %	Interest paid thru 12/1/2004	Interest Payable 12/2/04 *	Redemption Premium %	Redemption Premium \$	Total Principal, Interest & Redemption Premium @ 12/2/04
\$5,045,000 Serial Bonds:									
1994	510,000.00	(510,000.00)	-	-	-	-	-	-	-
1995	415,000.00	(415,000.00)	-	-	-	-	-	-	-
1996	430,000.00	(430,000.00)	-	-	-	-	-	-	-
1997	445,000.00	(445,000.00)	-	-	-	-	-	-	-
1998	465,000.00	(465,000.00)	-	-	-	-	-	-	-
1999	485,000.00	(485,000.00)	-	-	-	-	-	-	-
2000	505,000.00	(505,000.00)	-	-	-	-	-	-	-
2001	530,000.00	(530,000.00)	-	-	-	-	-	-	-
2004	615,000.00	(615,000.00)	-	-	-	-	-	-	-
2005	645,000.00	(645,000.00)	645,000.00	5.300%	12/1/2004	94.00	2.00%	12,900.00	657,994.00
Due 12/1/2005	5,045,000.00	(4,400,000.00)	645,000.00			94.00		12,900.00	657,994.00
\$1,140,000 Term Bonds									
Due 12/1/2003	1,140,000.00	(1,140,000.00)	-	-	-	-	-	-	-
\$2,965,000 Term Bonds									
Due 12/1/2009	2,965,000.00	(2,965,000.00)	2,965,000.00	5.625%	12/1/2004	458.00	2.00%	59,300.00	3,024,758.00
\$3,700,000 Term Bonds									
Due 12/1/2013	3,700,000.00	(3,700,000.00)	3,700,000.00	5.800%	12/1/2004	590.00	2.00%	74,000.00	3,774,590.00
\$12,150,000 Term Bonds									
Due 12/1/2022	12,150,000.00	(12,150,000.00)	12,150,000.00	5.875%	12/1/2004	1,961.00	2.00%	243,000.00	12,394,961.00
	25,000,000.00	(5,540,000.00)	19,460,000.00			3,103.00		389,200.00	19,852,303.00

* Based on actual # days convention

Loews Miami Beach
Lease Buyout - December 2004 - Schedule II

		<u>Base Rent</u>	<u>% Rent</u>	<u>Investment & Total Rent</u>	<u>Period</u>	<u>Factor</u>	<u>IRR Calc</u>	<u>Annual Rent</u>
Initial Investment				(24,000,000)	-	0.006434	(24,000,000)	
1999	Jan	52,627		52,627	1	1.006434	52,290.56	
	Feb	41,667		41,667	2	1.012909	41,135.96	
	Mar	41,667		41,667	3	1.019426	40,872.98	
	Apr	41,667		41,667	4	1.025985	40,611.69	
	May	41,667		41,667	5	1.032587	40,352.06	
	Jun	41,667		41,667	6	1.039230	40,094.10	
	Jul	41,667		41,667	7	1.045917	39,837.78	
	Aug	41,667		41,667	8	1.052646	39,583.10	
	Sep	41,667		41,667	9	1.059419	39,330.05	
	Oct	41,667		41,667	10	1.066235	39,078.62	
	Nov	41,667		41,667	11	1.073095	38,828.80	
	Dec	41,663		41,663	12	1.080000	38,576.87	510,960
2000	Jan	41,667		41,667	13	1.086948	38,333.93	
	Feb	41,667		41,667	14	1.093942	38,088.87	
	Mar	41,667		41,667	15	1.100980	37,845.37	
	Apr	41,667	252.973	294,640	16	1.108064	265,905.25	
	May	41,667		41,667	17	1.115193	37,363.03	
	Jun	41,667		41,667	18	1.122368	37,124.18	
	Jul	41,667		41,667	19	1.129590	36,886.85	
	Aug	41,667		41,667	20	1.136857	36,651.03	
	Sep	41,667		41,667	21	1.144172	36,416.73	
	Oct	41,667		41,667	22	1.151534	36,183.92	
	Nov	41,667		41,667	23	1.158943	35,952.60	
	Dec	41,663		41,663	24	1.166399	35,719.33	752,973
2001	Jan	41,667		41,667	25	1.173904	35,494.39	
	Feb	41,667		41,667	26	1.181457	35,267.48	
	Mar	41,667		41,667	27	1.189058	35,042.02	
	Apr	41,667	2,054,967	2,096,634	28	1.196709	1,752,000.50	\$2,054,967.00 Paid 3/30/01
	May	41,667		41,667	29	1.204408	34,595.41	
	Jun	41,667		41,667	30	1.212157	34,374.25	
	Jul	41,667		41,667	31	1.219956	34,154.50	
	Aug	41,667		41,667	32	1.227806	33,936.15	
	Sep	41,667		41,667	33	1.235705	33,719.21	
	Oct	41,667		41,667	34	1.243656	33,503.64	
	Nov	41,667		41,667	35	1.251657	33,289.46	
	Dec	41,663		41,663	36	1.259711	33,073.47	2,554,967
2002	Jan	41,667		41,667	37	1.267816	32,865.19	
	Feb	41,667		41,667	38	1.275973	32,655.09	
	Mar	41,667		41,667	39	1.284182	32,446.33	
	Apr	41,667		41,667	40	1.292445	32,238.90	
	May	41,667		41,667	41	1.300760	32,032.80	
	Jun	41,667		41,667	42	1.309129	31,828.02	
	Jul	41,667		41,667	43	1.317552	31,624.55	
	Aug	41,667		41,667	44	1.326030	31,422.38	
	Sep	41,667		41,667	45	1.334561	31,221.50	
	Oct	41,667		41,667	46	1.343148	31,021.90	
	Nov	41,667		41,667	47	1.351790	30,823.58	
	Dec	41,663		41,663	48	1.360487	30,623.59	500,000
2003	Jan	41,667		41,667	49	1.369240	30,430.74	
	Feb	41,667		41,667	50	1.378050	30,236.20	
	Mar	41,667		41,667	51	1.386916	30,042.91	
	Apr	41,667	647,041	688,708	52	1.395840	493,400.44	\$647,041 Paid 4/22/2003
	May	41,667		41,667	53	1.404821	29,660.01	
	Jun	41,667		41,667	54	1.413859	29,470.40	
	Jul	41,667		41,667	55	1.422956	29,282.00	
	Aug	41,667		41,667	56	1.432111	29,094.80	
	Sep	41,667		41,667	57	1.441326	28,908.80	
	Oct	41,667		41,667	58	1.450599	28,723.99	
	Nov	41,667		41,667	59	1.459932	28,540.37	
	Dec	41,663		41,663	60	1.469325	28,355.19	
2004	Jan	41,667		41,667	61	1.478779	28,176.62	
	Feb	41,667		41,667	62	1.488294	27,996.49	
	Mar	41,667		41,667	63	1.497869	27,817.52	
	Apr	41,667	2,313,249	2,354,916	64	1.507507	1,562,126.58	Act 2003 % Rent
	May	41,667		41,667	65	1.517206	27,462.98	
	Jun	41,667		41,667	66	1.526968	27,287.42	
	Jul	41,667		41,667	67	1.536792	27,112.97	
	Aug	41,667		41,667	68	1.546680	26,939.64	
	Sep	41,667		41,667	69	1.556631	26,767.42	
	Oct	41,667		41,667	70	1.566646	26,596.30	
	Nov	41,667		41,667	71	1.576726	26,426.27	
	Dec	41,663		41,663	72	1.586871	26,254.81	
				Sum of above			(17,650,571.16)	
				Amount for CF to = 0		=	17,650,571.16	
				X		1.586871	=	28,009,177.83
								Amount due, after 2004 Base Rent

ARTICLE 31.

APPRAISAL AND ARBITRATION

Section 31.1. Procedure for Appraisals.

In each instance under this Lease where appraisal is necessary or required, such appraisal shall be conducted as follows:

(a) The party desiring such appraisal shall give notice to that effect to the other party, specifying therein the name and address of the person designated to act as appraiser on its behalf, and, within fifteen (15) days after the service of such notice, the other party shall give notice to the first party specifying the name and address of the person designated to act as appraiser on its behalf. If either party fails to notify the other party of the appointment of its appraiser, as aforesaid, within or by the time above specified, then the appointment of the second appraiser shall be made in the same manner as hereinafter provided for the appointment of a third appraiser in a case where the two appraisers appointed hereunder and the parties are unable to agree upon such appointment.

(b) As soon as practicable, but in no event later than ninety (90) days after appointment of the appraisers as aforesaid, each appraiser shall notify Owner and Tenant of the appraisal value determined by such appraiser.

(c) If the lower of the two appraisal values is within ten percent (10%) of the higher appraisal value, the appraisal value finally adopted shall be the average of the two appraisal values. If the difference between the lower appraisal value and the higher appraisal value is greater than ten percent (10%) of the higher appraised value, then Owner and Tenant may either agree on the valuation in question, or themselves appoint a third appraiser, in which case each of Owner and Tenant shall submit to such third appraiser its appraisal value. Within a period of thirty (30) days after the appointment of such third appraiser, such third appraiser shall select one of the two values submitted by Owner and Tenant and such appraisal value shall be binding on the parties.

(d) In the event the two parties are unable to agree upon the appointment of a third appraiser within fifteen (15) days after their being unable to agree upon a valuation, then either party, on behalf of both, may apply to the Circuit Court of Dade County, Florida for the appointment of such third appraiser, and the other party shall not raise any question as to that court's full power and jurisdiction to entertain the application and make the appointment.

(e) Any appraiser selected or appointed pursuant to this Section shall be a member of the American Institute of Real Estate Appraisers (or a successor organization), shall be an appraiser, and shall have been doing business as such in the greater Miami, Florida area for a period of at least the fifteen (15) years immediately preceding the date of this appointment. All appraisers chosen or appointed pursuant to this Section shall be sworn fairly and impartially to perform their duties as such appraiser. In the event of the failure, refusal or inability of any appraiser to act, his successor shall be appointed within ten (10) days by the party who

originally appointed him; in the event such party fails so to appoint such successor, and in the case of the third appraiser, his successor shall be appointed as hereinabove provided.

(f) Each party shall pay the costs associated with the appraiser acting on such party's behalf and the parties shall share equally the costs attributable to any third appraiser appointed pursuant to this Section.

Section 31.2. Arbitration.

(a) Any dispute, disagreement, controversy or claim between Owner, Tenant and/or the City arising out of or relating to this Lease, or the breach hereof (a "Dispute") (except (i) for Development Disputes, as defined in the Hotel Development Agreement, to which expedited arbitration is applicable pursuant to the Hotel Development Agreement and (ii) as otherwise expressly set forth in the last paragraph of **Section 25.1**, above, and **Section 31.3**, below), shall be resolved by arbitration administered by the American Arbitration Association ("AAA") as provided in this **Section 31.2** and the Commercial Arbitration Rules of the AAA (the "AAA Rules") in effect as of the commencement of the applicable arbitration proceeding, except to the extent the then current AAA Rules are inconsistent with the provisions of this **Section 31.2**, in which event the terms hereof shall control. The arbitration shall be governed by the United States Arbitration Act and the Florida Arbitration Code to the extent the Florida Arbitration Code is not inconsistent with the United States Arbitration Act and this **Section 31.2**, and judgment upon the award entered by the arbitrators may be entered in any court having jurisdiction.

(b) Any arbitration pursuant to this **Section 31.2** shall be conducted in Dade County, Florida, but the arbitrators may direct that one or more hearings be held in New York City or such other place as they believe appropriate.

(c) (i) The arbitration shall be conducted by three (3) arbitrators, which arbitrators shall be selected in accordance with the AAA Rules, and at least one (1) of whom (but no more than two (2) of whom) shall have had experience in the management and/or operation of hotels, or as a consultant in connection with the management and/or operation of hotels.

(ii) Notwithstanding Subsection(c)(i) above, if the Dispute at issue is for a liquidated amount not in excess of \$100,000, adjusted for inflation, then the arbitration shall be conducted by one (1) arbitrator in accordance with the AAA Rules for Expedited Procedures, which arbitrator shall be selected in accordance with the AAA Rules for Expedited Procedures, and which arbitrator shall have had experience in the management and/or operation of hotels, or as a consultant in connection with the management and/or operation of hotels.

(iii) In connection with any arbitration proceeding pursuant to this **Section 31.2**: (A) No arbitrator shall have been employed or engaged by a party hereto or its hotel consultants within the previous five (5) year period; (B) Each arbitrator shall be neutral and independent of the parties to this Lease and their respective hotel consultants; (C) No arbitrator shall be affiliated with either party's auditors; (D) No arbitrator shall be employed by any hotel

operator or an Affiliate of any hotel operator; and (E) No arbitrator shall have a conflict of interest with (including, without limitation, any bias towards or against) a party hereto or its then current hotel consultants. As used in this Lease, the term "arbitrator" or "arbitrators" shall mean the one (1) member arbitration panel or the three (3) member arbitration panel, as applicable, described herein.

(d) The award of the arbitrators shall be accompanied by a statement of the reasons upon which the award is based. The arbitrators shall not have the power to modify this Lease. The award may not include, and the parties specifically waive, any award of punitive damages or attorneys' fees and costs. Accordingly, each party shall bear its own attorneys' fees and costs incurred in connection with any arbitration proceeding. The fees and costs of the arbitrators shall be borne equally by the parties.

(e) The arbitrators may consolidate proceedings with respect to any Dispute under this Lease with proceedings with respect to any related controversy, provided that any parties to such controversy who are not parties to this Lease consent to such consolidation.

(f) The parties will cooperate in the exchange of documents relevant to any Dispute. Deposition or interrogatory discovery may be conducted only by agreement of the parties or if ordered by the arbitrators. In considering a request for such deposition or interrogatory discovery, the arbitrators shall take into account that the parties are seeking to avoid protracted discovery in connection with any arbitration proceeding hereunder.

Section 31.3. Election of Remedies.

(a) If an Event of Default Notice states that Owner has elected to seek the remedy of termination of this Lease, then Section 31.2 shall not be applicable. In such event, Owner shall be required to commence a proceeding against Tenant within sixty (60) days after Tenant's receipt of the Event of Default Notice, in the Circuit Court in and for Dade County, Florida, which court shall have the same power to review the arbitration award finding the existence of the Default (or in the case of Section 25.1(c), the "Event of Default" under the Hotel Development Agreement) that is the subject of the Event of Default Notice that a court of appeals would have with respect to the judgment of a trial court sitting without a jury. Such proceeding shall expressly seek, as an initial request for relief, among other relief not prohibited by this Lease that may be requested at the discretion of Owner, an equitable determination by the court that an Event of Default exists under the terms of this Lease and an award of termination of this Lease. Tenant shall have the right to assert any counterclaim it may have against Owner in any such proceeding. Such proceeding shall be commenced by Owner in the Circuit Court in and for Dade County, Florida. If it is determined that the Circuit Court does not have subject matter jurisdiction over such proceeding, then Owner shall dismiss such action and the matter shall be submitted to arbitration in accordance with Section 31.2.

(b) If an Event of Default Notice does not state that Owner has elected to seek the remedy of termination of this Lease, then any Dispute arising therefrom shall be subject to arbitration in accordance with Section 31.2. If Tenant shall dispute Owner's assertion that

such Event of Default has occurred, Tenant shall, within ten (10) business days after Tenant's receipt of the Event of Default Notice, commence an arbitration proceeding regarding such Dispute. In such event, an Event of Default shall not be deemed to have occurred and Owner shall not be permitted to exercise any rights against Tenant pursuant to **Section 25.2(a)** or **Section 25.2(b)** until such time as the arbitrators have determined that an Event of Default has occurred.

Section 31.4. Emergency Provisional Relief.

If a party determines that a Dispute presents such party with an extraordinary situation that requires it to seek emergency provisional relief prior to the appointment of the arbitrators who will determine such Dispute, it may seek such emergency provisional relief from any court having jurisdiction; provided, however, that (i) in order to obtain any such relief, the court shall determine that such party has met any applicable standards imposed by the law applicable to the relief requested with respect to such party's rights to such relief and (ii) such relief may only be sought and obtained on the condition that any order entered by the court will expire ten (10) days after the appointment of the arbitrators unless the party that sought the order renews its application for emergency provisional relief to the arbitrators within such ten (10) day period, which arbitrators shall then make *de novo* any findings of fact that may be required in ruling on such renewed application.

ARTICLE 36.

OPTION TO PURCHASE; RIGHT OF FIRST REFUSAL

Section 36.1. Right of First Refusal.

(a) Definitions.

"**Option Interest**" means all of the Equity Interests in Owner.

"**Option Premises**" means the entire Owner's Interest in the Premises.

"**Option Transaction**" means the sale, conveyance or other transfer, directly or indirectly, of (i) all of Owner's estate in and to the Option Premises or (ii) all of the estate of the holders of the Option Interest in and to such Option Interest.

(b) If, during the Term, Owner, or any successor owner of the Option Premises, or the holder of any Option Interest, shall have received and shall desire to accept a *bona fide* offer from a *bona fide* third party offeror (the "**Outside Offer**") with respect to an Option Transaction, Owner or such holder (each an "**Offeree Owner**") shall first deliver to Tenant a copy of a fully executed letter of intent or purchase contract setting forth the material terms of such Outside Offer (including, but not limited to, the purchase price, method of payment and financing arrangements and the closing date (which shall not be less than sixty (60) or more than one hundred eighty (180) days from the date of the Outside Offer Notice)) and stating that Offeree Owner desires to accept such Outside Offer (an "**Outside Offer Notice**"). For a period of forty-five (45) days after Tenant's receipt of the Outside Offer Notice, Tenant shall have the right to elect in writing to consummate the Option Transaction described therein at the price and upon such other material terms set forth in the Outside Offer Notice.

(c) If Tenant shall fail to respond to Offeree Owner with respect to the offer set forth in an Outside Offer Notice with an election pursuant to Section 36.1(b) hereof by the end of such forty-five (45) day period, Offeree Owner shall have the right to consummate the proposed transaction with the Person having made the Outside Offer to Offeree Owner upon such terms and conditions as shall be no more favorable to such Person than those which are set forth in the Outside Offer Notice, but in all cases subject to any terms of, and applicable restrictions imposed under, this Lease, including, without limitation, the Purchase Option and Tenant's right of first refusal. If Offeree Owner shall fail to consummate the Option Transaction set forth in such Outside Offer Notice by the closing date set forth therein (subject to reasonable extensions), the provisions of this Section 36.1 shall be applicable to any such future Option Transaction as well regardless of whether it is the same Person and/or Outside Offer. Notwithstanding anything to the contrary contained herein, Offeree Owner may in good faith negotiate the terms and conditions of an Outside Offer set forth in an Outside Offer Notice which Tenant has elected not to consummate with the Person having made the Outside Offer, provided, however, that if the material terms of such Outside Offer are modified, then such transaction shall be deemed a new Option Transaction and the provisions of this Section 36.1 (including, without limitation, Section 36.1(b)), shall be applicable with respect to such

Option Transaction. Offeree Owner shall give twenty (20) days notice to Tenant of the terms of such Outside Offer as so negotiated prior to consummating the same, so that Tenant may determine whether such modifications are sufficiently material that Tenant wishes to consummate such Option Transaction.

(d) Offeree Owner and Tenant shall diligently and in good faith undertake to consummate any Option Transaction involving Tenant under this Article 36 as soon as practicable after Tenant's election as hereinabove described. If Tenant shall fail to negotiate the terms of the Option Transaction in good faith or shall fail to close (except by reason of a default by Offeree Owner) the Option Transaction in accordance with the terms thereof which shall not be earlier than thirty (30) days from the date of Tenant's exercise of its right of first refusal, the foregoing right of first refusal shall be null and void with respect to any future Option Transaction.

(e) Offeree Owner shall be entitled to sell only all of its interest in the Option Premises or the Option Interest, as the case may be. Any sale of only a portion of its interest in the Option Premises or the Option Interest shall be null and void and of no effect.

(f) If Tenant does not exercise its right of first refusal and Offeree Owner consummates its Option Transaction, Offeree Owner shall deliver to Tenant, or shall cause to be delivered to Tenant, within ten (10) business days after the execution thereof, a true, complete and correct copy of an executed instrument of transfer and, if the Option Transaction is a conveyance of the Option Premises, a true, complete and correct copy of an instrument of assumption by the transferee of Offeree Owner's obligations under this Lease, the Project Documents and any other instruments relating to Owner's Interests in the Premises to which Owner is a party (or a successor-in-interest to a party) accruing from and after the date of such transfer. Such transferee, if a transferee of the Option Premises, shall be deemed to assume this Lease, the Project Documents and any other instruments relating to Owner's Interest in the Premises to which Owner is a party (or a successor-in-interest to a party) and shall be liable for the performance of and compliance with the terms, covenants, conditions, and agreements contained in this Lease and the Project Documents and any other instruments relating to Owner's Interests in the Premises on the part of Owner (or any successor-in-interest to Owner) to be performed, including, without limitation, monetary obligations. Upon the consummation of an Option Transaction, Offeree Owner shall be and hereby is entirely freed and relieved of all agreements, covenants and obligations of Owner to be performed under this Lease (but not from any other Project Document and any other instruments relating to Owner's Interests in the Premises, each of which shall survive (but only to the extent provided therein) in accordance with its respective terms), accruing after the date of such Option Transaction. No transfer shall be binding on Tenant unless and until such transferee shall enter into an agreement containing a covenant of assumption as aforesaid.

(g) If Offeree Owner does not comply with the terms of this Article 36, any Option Transaction entered into by Offeree Owner shall have no validity and shall be null and void and without effect.

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Section 36.2. Option to Purchase.

(a) Tenant shall have the right and option to purchase all of Owner's Interest in the Premises upon the terms and conditions set forth in this Section and in **Exhibit 36.2** (the "**Purchase Option**"). Tenant may, at any time during the Term, exercise such right and option pursuant to a notice (the "**Exercise Notice**") delivered to Owner not later than sixty (60) days prior to the proposed closing date for such purchase.

(b) The purchase price for the Premises shall be calculated as follows:

(i) While the Agency's Tax Increment Revenue Bonds, Series 1993 (in an amount not to exceed \$25,000,000) (the "**Bonds**") have not been retired, the purchase price for Owner's Interest in the Premises shall be equal to the greater of (x) the then appraised fair market value of Owner's Interest in the Premises (in accordance with **Article 31** hereof) based upon an arm's length sale to a third party buyer that is not an Affiliate of Tenant, taking into account the then current state of title as well as the continued existence of this Lease and the Management Agreement as then in effect, or (y) the amount determined as follows:

- (1) For all Lease Years until Percentage Rent payments have reached Tier 5A: an amount to return to the Agency an 8% IRR (which calculation will include Base Rent and Percentage Rent payments made to Owner and Distribution Net Proceeds and Net Proceeds distributed to Owner pursuant to **Section 3.5**) on the Land with a fixed value of \$24,000,000.
- (2) For Lease Years in which Percentage Rent is being paid at Tier 5A, but not Tier 5B or Tier 6: an amount equal to the greater of (i) an amount to return to Owner an 8% IRR (which calculation will include Base Rent and Percentage Rent payments made to Owner and Distribution Net Proceeds and Net Proceeds distributed to Owner pursuant to **Section 3.5**) on the Land with a fixed value of \$24,000,000 or (ii) a ten times multiple of the average Base Rent and Percentage Rent paid to Owner during the three full Lease Years immediately preceding the exercise of the Purchase Option.
- (3) For Lease Years in which Percentage Rent is being paid at Tier 5B or Tier 6: an amount equal to the sum of (i) the balance of the amounts, if any, payable to Owner under Tier 5B, plus (ii) a ten times multiple of the lesser of (x) average Base Rent and Percentage Rent paid to Owner during the three full Lease Years immediately preceding the exercise of the Purchase Option, or (y) average Base Rent and Tier 6 Percentage Rent which would have been payable to Owner during the three full Lease Years immediately preceding the exercise of the Purchase Option determined as if payments were due in Tier 6 for each of such three Lease Years.

appraisal forms

(ii) Notwithstanding the foregoing, (x) the purchase price with respect to the exercise of the Purchase Option after December 1, 2004 shall be computed pursuant to (b)(i)(y) above (without regard to (b)(i)(x) above) if at least 122 days prior to the exercise of such option, Tenant shall have given Owner notice (the "Notice of Intent to Exercise") of Tenant's intent to exercise the Purchase Option and unconditionally prepay Base Rent and Percentage Rent under this Lease in an amount sufficient to redeem the Bonds in accordance with their terms prior to the exercise of such Purchase Option, which amount shall (to the extent the same represents prepaid Base Rent and Percentage Rent at such time) upon the exercise of the Purchase Option be credited against the purchase price of Owner's Interest in the Premises and (y) the purchase price with respect to the exercise of the Purchase Option at any time after the holders of the Bonds have been paid in full all principal and interest thereon and the Bonds have been retired (other than as a result of (b)(ii)(x) above) shall be computed pursuant to (b)(i)(y) above (without regard to (b)(i)(x) above) and the requirements of (b)(ii)(x) above shall not apply to the exercise of the Purchase Option.

(iii) The purchase price with respect to each exercise of the Purchase Option shall be determined based upon the most recent Annual Financial Statement required to be made available to Owner under Section 28.1(c) as of the earlier of (x) the date Tenant gives the Exercise Notice and (y) the date Tenant gives the Notice of Intent to Exercise.

(c) The parties acknowledge that Section 36.2(b)(i)(x) has been included based upon the present interpretation of Section 144(c)(2) of the Internal Revenue Code of 1986, as amended (the "Code") in relation to the Bonds by counsel to the Agency. The parties agree that such Section 36.2(b)(i)(x) shall not apply if at any time Tenant provides an opinion of tax counsel knowledgeable with respect to the tax aspects of tax-exempt bonds, in form and substance satisfactory to the Agency and its counsel, to the effect that the exercise of the Purchase Option at the price determined pursuant to Section 36.2(b)(i)(y) will not adversely affect the exclusion from gross income for federal income tax purposes of interest on the Bonds.

(d) In the event, within twelve (12) months following the delivery of the Exercise Notice by Tenant (the date of such delivery being called the "Exercise Date"), Tenant, or an Affiliate, shall consummate the Sale of the Hotel to a third party not Affiliated with Tenant (a "Post-Option Sale") with whom Tenant had reached an agreement in principle, evidenced in writing, at any time during the six (6) month period prior to the Exercise Date, the Post-Option Sale shall be deemed to have taken place on the Exercise Date and the Distribution Net Proceeds shall be distributed in the same manner as Net Cash Flow After Debt Service in accordance with Section 3.3, subject to a credit in favor of Tenant in an amount equal to the purchase price theretofore paid to Owner.

(e) The provisions of this Section shall survive the Expiration of the Term.

Section 36.3. Assignment.

The rights of Tenant pursuant to Sections 36.1 and 36.2 above shall not be severed from Tenant's Interest in the Premises, and shall be assigned, transferred or otherwise conveyed to the transferee only upon a Sale of the Hotel or a Foreclosure Transfer.

EXHIBIT 36.2

TERMS OF OPTION TO PURCHASE

1. Purchase Price.

The Purchase Price shall be determined in accordance with Section 36.2 of this Lease and shall be payable at the closing of the purchase by wire transfer of immediately available funds to an account designated in writing by Owner.

2. Closing Date.

The closing of the purchase shall take place on date designated by Owner, but in any event not less than thirty (30) days nor more than sixty (60) days following the date Tenant exercises its option to purchase in accordance with Section 36.2 of this Lease.

3. Deed; Title.

At the closing of the purchase, Owner shall convey to Tenant (i) all of Owner's right, title and interest to the Land and the condominium unit covered by the Condominium Unit Lease by one or more special warranty deeds and (ii) all of Owner's right, title and interest in and to this Lease and the Condominium Unit Lease by one or more assignments of lease. The forms of such deeds and assignments of lease shall be mutually acceptable to Owner and Tenant but shall not in any event provide for any representations by Owner other than a representation that Owner has not theretofore transferred or assigned the items being transferred or conveyed thereby and the representations and warranties customarily contained in a special warranty deed. The Land, the condominium unit, the Lease and the Condominium Unit Lease shall be conveyed to Tenant subject to all liens, encumbrances and other matters then affecting the title thereto and any state of facts a survey may reveal (but in all cases subject to Owner's obligations under Section 2.2 of the Lease). Owner shall also execute all other documents customarily used in real estate transactions in Metropolitan Dade County, Florida; provided, however, that if Owner is a Governmental Authority, (x) such documents shall not include those documents from which Governmental Authorities are exempt pursuant to applicable Requirements and (y) with respect to any title affidavit required of Owner, (i) Owner shall not be required to make any statement or certification regarding parties-in-possession and (ii) any statement or certification regarding mechanics' or materialmen's liens shall cover only work or materials directly contracted for by Owner in writing.

4. Rent; Prorations.

At the closing of the purchase, all Base Rent and Percentage Rent shall be prorated through the date of closing and paid to the party entitled thereto. No other prorations shall be made.

5. Expenses.

Each party shall pay its own attorneys' fees. All transfer taxes, title charges, recording fees, survey charges and other expenses incurred in connection with the purchase shall be paid by Tenant; provided, however, that Owner shall pay all documentary stamp taxes and surtax, if any, payable in connection with the purchase.